Supreme Court, U.S.
F I L E D
AUG 11 1989
JOSEPH F. SPANIOL, JR.
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No. 89-50

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

LORI S. HARDEMAN,

Petitioner,

vs.

CHRYSLER CREDIT CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Court Of Appeals For The Twelfth District, Butler County

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BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Federal Trade Commission prescribed language in 16 C.F.R. 433.2 contemplate as a "claim" which a debtor can assert against an innocent holder of a consumer credit contract, punitive damages assessed to punish the seller?

2. Where state law allows attorneys' fees to a prevailing party only if the opposing party is found to be in bad faith, does the Federal Trade Commission prescribed language in 16 C.F.R. 433.2 contemplate as a "claim" which a debtor can assert aganst an innocent holder of a consumer credit contract, an award of such fees assessed against the seller?

PARTIES

Petitoner is an individual, Lori Hardeman, and Respondent is Chrysler Credit Corporation, a Delaware corporation.

RULE 28.1 STATEMENT

Respondent is a wholly owned subsidiary of Chrysler Financial Corporation which is a wholly owned subsidiary of Chrysler Corporation. Respondent's affiliates are Chrysler Insurance Company and Chrysler Life Insurance Company.

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BRIEF OF RESPONDENTS IN OPPOSITION

I.

COUNTERSTATEMENT OF THE CASE

The Federal Trade Commission has defined as an unfair or deceptive act or practice the failure of a seller to take or receive a consumer credit contract which fails to contain the following provision in at least 10 point bold face type:

NOTICE

> Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof; recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.

Respondent purchased a consumer credit contract which **did** contain this language in compliance with the Federal Trade Commission regulation. The trial court herein as well as the Ohio Court of Appeals held that the "claims" contemplated by this language did not include punitive damages and/or attorneys' fees awarded against a seller by a court or jury to punish the seller for its wrongdoing, where the holder (respondent) in no way participated in such wrongdoing. Petitioner cites no case in point where a court has interpreted whether such punitive damages constitute the type of "claim" intended by the Federal Trade Commission rule. Apparently, this issue is not a hot one; there is no conflict in that regard and, therefore, no particular reason for this Court to assume jurisdiction to review what is essentially a local decision based on local law.

II.

ARGUMENT

A. The Petition for a Writ of Certiorari should be denied because the Ohio Court of Appeals correctly decided the issue herein.

It must first be emphasized to the Court that the jury in the instant case, although they found in favor of the plaintiff, found that as a result of the actions of Wheels, Inc., the seller of the vehicle involved, the plaintiff was damaged to the extent of only $5,000.00. To that extent, a setoff against respondent has been allowed by the courts below in accordance with the contractual language included in the contract to comply with the Federal Trade Commission rule.

Petitioner, at page 22-23 of her brief, cites the Commission's comment in conjunction with the promulgation of the rule at issue. Included in this language is the following:

> Our primary concern in the course of these proceedings has been the distribution or allocation of *costs* occasioned by seller misconduct in credit sales transactions. . . . We conclude that a consumer's duty to pay for goods or services must not be separated from a seller's duty to perform as promised. (Emphasis Supplied).

It is thus apparent that the intent of the Federal Trade Commission was to hold a consumer harmless from losses arising out of seller misconduct. There was no intent to preserve for the consumer as a claim or setoff against an innocent holder, the essential windfall of punitive damages. These have no relationship to the consumer's "costs" but are intended to deter a wrongdoer from repeating its acts.

Respondent in no way disputes the appropriateness of the public policy which allowed petitioner to set off $5,000.00 against respondent's claim against her. However, in no case cited by petitioner has it appeared that damages of a punitive nature were allowed as such a setoff. The case of *General*

Motors Acceptance Corp. v. *Grady*, (1985) 27 Ohio App.3d 324, did not involve punitive damages.

The case of *Thomas* v. *Ford Motor Credit Co.*, 48 Md. App. 617, 429 A.2d 287 (C.A. Md. 1981), specifically held that only "if the appellants can prove the allegations of direct participation by the appellee [holder of the note] in the fraud" may they have a setoff of punitive damages against the amount otherwise due the holder. In the instant case, there is no allegation or even implication that respondent, Chrysler Credit Corporation, was involved in any fraud or wrongdoing. Similarly, in the other cases cited by petitioner, although courts allowed a setoff under the FTC rule relative to actual out of pocket costs or damages to the consumer, in no instance were punitive awards against the wrongdoing seller allowed as a setoff against an innocent holder.

The same arguments apply relative to a setoff of attorneys' fees.

As pointed out by the Ohio Court of Appeals (p. A-46, petitioner's brief), the provisions of Ohio Revised Code 1345.09 permit the award of attorneys' fees against a supplier only if it "knowingly" violates the Ohio Consumer Practices Act (p. A-62, petitioner's brief), and as stated in *State ex rel. Kabatek* v. *Stackhouse*, (1983) 6 Ohio St.3d 55, 451 N.E.2d 248:

> The general rule in Ohio is that absent a statutory provision allowing attorneys' fees . . . the prevailing party is not entitled to an award of attorneys' fees unless the party against whom the fees are taxed was found to be in bad faith.

Thus, it is apparent that in Ohio an award of attorneys' fees is in the nature of punitive damages and the Court of Appeals was thus correct in not allowing them as a setoff against an innocent holder who in no way participated in the action of the seller sought to be punished.

Obviously, having succeeded in the lower courts in the assertion of its position that punitive damages are not allowed

as a setoff under these circumstances, there is no reason why Chrysler Credit Corporation should be held liable for the plaintiff's attorneys' fees in prosecuting that unsuccessful claim.

B. The Petition for a Writ of Certiorari should be denied because there is no issue involved of any national importance.

Petitioner states at page 17 of her brief that "one finds the state court decisions are different on this issue throughout the country. The FTC has been silent on this issue."

Although we agree that the FTC has been silent upon the issue, we cannot agree that state court decisions are different on the issue. As a matter of fact, we can find no decision of any state court which directly considered and decided the issue one way or the other. The cases cited by petitioner clearly establish the rule that judgments for damages defining the extent to which consumers have incurred costs and losses arising out of the actions of the seller of a consumer product, have been properly set off against the holder of sales contracts. The law which these cases establish has been applied in the instant case since the $5,000.00 in damages (as well as $600.00 which the lower court allowed "in lieu of damages;" p. A-16, petitoner's brief) have been set off to reduce respondent's claim against petitioner. The intent and philosophy of the Federal Trade Commission in promulgating 16 C.F.R. 433.2 has been fully implemented by the decision below. It appears that the issue involved in this case has been seldom, if ever, litigated on a nationwide basis. On the record, therefore, it appears that the outcome of this case will be of interest only to the parties and does not justify the intervention of the Supreme Court of the United States.

III.

CONCLUSION

The cost to petitioner of the misconduct of the seller in this case has already been borne by respondent. There is no justifiable reason, nor did the Federal Trade Commission intend, that the burden of a punishment levied against a wrongdoing seller, which has no dollar relationship to the out of pocket damages to the consumer, be assessed against an innocent holder. The decisions of the lower courts are correct under Ohio law. There are no cited decisions elsewhere to the contrary indicating that the issues in this case are of such national importance that the Supreme Court should consider them. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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